

THE ADMISSIBILITY OF BEHAVIORAL SCIENCE INFORMATION IN CRIMINAL TRIALS

From Primitivism to *Daubert* to Voice

Christopher Slobogin
University of Florida College of Law

This article advances a 5-stage developmental view of evidentiary law's approach to the admissibility of behavioral science information in the criminal courts. The 1st, most primitive, developmental stage—often evident in cases involving testimony based on traditional psychiatric diagnoses—focuses on the credentials of the expert. The 2nd stage looks at whether other experts share the theory or methodology of the proffered expert (a stance encapsulated in *Frye v. United States*' general acceptance test). The 3rd stage of evidentiary development is more interested in the validity of the theory or methodology than in who, or how many, endorse it (a position reflected in *Daubert*). The 4th stage is concerned with the extent to which the behavioral science information adds to the validity of the legal decision to be made (a stance related to, but more demanding than, Rule 702's helpfulness standard). The final (highest developmental?) stage recognizes that, when scientific proof of validity is unobtainable, there are still normative reasons for allowing consensus-based testimony which gives criminal defendants a voice in the process.

I. Introduction

According to most commentators, the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ conditions the admissibility of expert testimony on a scientific demonstration of its validity.² To the extent that is the case, the decision calls for a sea change in the traditional expert role of mental

Christopher Slobogin, JD, LL.M., is a Stephen C. O'Connell Professor of Law at the University of Florida, Fredric G. Levin College of Law. I thank Mark Fondacaro, Rick Matasar, Andrew Taslitz, and Stephen Friedland for their comments on the ideas expressed in this article. This article is an expanded version of a talk given at the biennial meeting of the American Psychology–Law Society, March 1998, in San Diego, California.

Correspondence concerning this article should be addressed to Christopher Slobogin, University of Florida, Fredric G. Levin College of Law, Southwest 2nd Avenue/Southwest 25th Street, Gainesville, Florida 32611.

¹509 U.S. 579 (1993).

²See, e.g., ANDRE E. MOENSSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 12 (1995) (*Daubert* “mandated that in the future, instead of proof of general acceptance, proof that establishes the ‘scientific reliability’ of expert opinion evidence be produced . . .”); Lee Loevinger, *Science as Evidence*, 153 JURIMETRICS JOURNAL 189–190 (1995) (“The memorable and enduring teaching of *Daubert* is that the law must respect the process and authenticity of science and accept only valid scientific evidence”); Michael H. Graham, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: No Frye, Now What?* 30 CRIM. L. BULL. 153, 163 (1994) (“[T]rial judges are required under *Daubert* to act as gatekeepers, screening scientific evidence to ensure the scientific reliability–validity of the reasoning or methodology of the expert’s testimony.”).

Daubert left open whether its holding applied to testimony based on “technical” and “specialized,” as opposed to “scientific,” knowledge. However, in *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999), the Court made clear that *Daubert* applies to the latter type of testimony as well. See *infra* text accompanying notes 65–66.

health professionals, at least in criminal cases. Psychiatrists, psychologists, and social workers who base their testimony in such cases on behavioral science information are often, at best, engaging in informed speculation, not reporting data obtained through rigorous scientific methods. Thus, under the prevalent reading of *Daubert*, their opinions ought to be circumscribed or banned outright from the criminal courtroom.³

In some settings, an insistence that expert testimony prove its scientific bona fides makes sense. When the issue is the admissibility of behavioral science testimony in criminal adjudications, however, a rigid requirement of scientific validity could do more harm than good. A strong case can be made that, in this context, evidence law should maintain a high degree of flexibility; it must take into account not only the commendable goal of obtaining expert information that is as valid as possible but also the norms incorporated in the substantive criminal law, the inevitable deficiencies of behavioral science in determining past mental states, and the interests of criminal defendants and society in fair adjudications.

In another article,⁴ I proposed an evidentiary framework that accommodates these disparate concerns. The article also described in a fairly straightforward way how courts before and after *Daubert* have treated expert psychiatric and psychological testimony in criminal trials (hereinafter referred to simply as *psychological testimony*).⁵ In this article I look at the same material through a different heuristic: a conceptualization of the law of expert evidence from a "developmental" perspective. Specifically, I examine the different ways the law could evaluate the worth of expert testimony, from the most primitive approach to the most enlightened, and I try to flesh out the usefulness of each approach in the specific context of criminal adjudications.

The article begins with an overview of both the nature of psychological testimony (in Part II) and the law's treatment of it (in Part III). In Part IV I advance and discuss five ascending stages through which the law of expert admissibility could develop: expert as shaman, expert as representative, expert as scientist, expert as enhancer, and expert as interpreter. I argue that each of these approaches (except perhaps the first) should have a role to play in admissibility analysis, depending on the legal context and psychological insights involved.

The preferred mode should be that suggested by *Daubert*: the expert as scientist or as enhancer (the latter role referring to the expert whose scientific information is likely to add to the incremental validity of the court's decision). However, when the testimony is meant to address a mental state defense, a different approach is warranted. Because the inquiry into past mental state is inevitably subjective and virtually impossible to carry out scientifically, even experts with nonscientific information should be permitted to testify in support of such defenses, at least when the information is "representative" of common clinical wisdom. In this context, the expert's use of this wisdom helps fulfill the

³For one conclusion to this effect, see Michael J. Gottesman, *Admissibility of Expert Testimony after Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867, 875-76 (1996) ("The Court's opinion [in *Daubert*] read literally would dictate the end of the receipt of psychiatric and psychological testimony in federal courts.").

⁴Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1 (1998).

⁵*Id.* at 19-29.

fundamental goal of “interpreting” the defendant’s offense, an interpretation which should be allowed even if the basis of the testimony is not demonstrably valid.

Part V of the essay tries to bolster this conclusion in two ways. Relying on recent U.S. Supreme Court precedent, it first argues that criminal defendants are entitled, as a constitutional matter, to tell their story in the most effective manner possible, even if it relies on suspect information. Second, I argue that depriving defendants of their ability to tell such stories might also undermine the appearance of fairness, not just from the defendant’s viewpoint but from society’s as well. In short, the mental health professional functioning as an expert interpreter of nonscientific information helps give the defendant “voice” and, as such, is an essential part of any effort to prove diminished culpability caused by mental disorder.

II. Psychological Testimony in Criminal Trials

The potential scope of psychological testimony has expanded immensely in the past few decades. A half century ago, mental health professionals who testified at criminal trials were almost sure to be talking about the insanity defense. Today, however, that granddaddy of criminal mental health law is only one of many issues psychiatrists and psychologists routinely address in the criminal courts. Most of these new legal developments have been in the culpability branch of the criminal mental health law family, but the growth of a “credibility branch” of psychological testimony is also worth noting.

Doctrines relating to *culpability* have proliferated as the criminal law recognized that both retributive and utilitarian theories require some attempt to gauge subjective mental state at the time of the offense. Almost as old as the insanity defense is its first cousin, the automatism defense,⁶ which explores the voluntariness of the defendant’s criminal actions and is often bolstered by psychological testimony. The insanity defense’s twin offspring, diminished capacity (focused on *mens rea*) and diminished responsibility (focused on any kind of impairment short of insanity), have now become firmly ensconced in many jurisdictions for some types of offenses,⁷ and mental health professionals help keep them alive. A “third generation” development that has created business for mental health professionals is the subjectification of justification doctrine; for certain crimes this new type of excuse recognizes a defensive claim whenever the defendant believes force was necessary, however mistaken or “crazy” that belief was.⁸

⁶For one formulation of the doctrine, see AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 2.01 (approved 1975).

⁷About half the states permit clinical testimony on *mens rea* in at least some types of cases, and many states also permit diminished responsibility testimony in homicide cases when presented in an effort to reduce murder to manslaughter. See generally, WAYNE LAFAYE & AUSTIN SCOTT, CRIMINAL LAW § 4.7 (1986).

⁸See, e.g., N.D. CENT. CODE §§ 12.1-05-08 (“Excuse. A person’s conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter even though his belief is mistaken. However, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. . . .”).

In the past few decades, mental health professionals have also added to their trial repertoire opinions about criminal propensity, a type of testimony that used to be relegated to sentencing proceedings. This "character evidence"⁹ might be called a stepchild of the various mental state defenses because, although it deals with culpability, it is not directed either at mental state per se nor at the voluntariness of one's actions, but at whether the defendant is the type of person who could have committed the criminal act at all. Such testimony might, for example, describe the defendant as a "passive" personality who could not commit a violent act,¹⁰ or as someone who fits the profile of a rapist and therefore could have committed a sexual offense.¹¹

Whereas the branch of the family dealing with culpability issues has flourished, the *credibility* arm of the clan is somewhat less well developed. Nonetheless, a sizeable number of courts have also permitted expert behavioral science testimony that is directly focused on assessing the reliability or honesty of witnesses. Into this category fall opinions about the accuracy of eyewitnesses,¹² the common traits of people who claim to have been raped or abused,¹³ and the highly controversial phenomenon of repressed memory.¹⁴

As the law has propagated new substantive doctrines, the basis of the psychological opinions it has confronted has mutated over time as well. Most psychological testimony still relies on long-accepted diagnoses such as schizophrenia, manic-depressive psychosis, mental retardation, and the traditional personality disorders, such as antisocial personality, all of which have been in the American Psychiatric Association's *Diagnostic and Statistical Manual* for decades. However, more controversial diagnoses and psychiatric constructs have also found their way into the courtroom, including multiple personality disorder,¹⁵ psychodynamic formulations based on unconscious conflicts,¹⁶ the XYY chromosomal abnormality,¹⁷ hypoglycemia-induced cognitive impairment,¹⁸ and dependent personality disorder.¹⁹ Then there are the syndromes. To name a few, in the approximate order

⁹Federal Rule of Evidence 404(a)(1) allows a criminal accused to introduce evidence of character or a trait of character, and Rule 405(a) allows this evidence to be presented in the form of "testimony in the form of an opinion."

¹⁰See, e.g., *Waine v. State*, 37 Md. App. 222, 377 A.2d 509 (1977).

¹¹See, e.g., *State v. Hickman*, 337 N.W.2d 512 (Iowa 1983).

¹²See, e.g., *Arizona v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983).

¹³See, e.g., *People v. Taylor*, 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131 (1990) (evidence of rape trauma syndrome admissible to explain why victim may have delayed reporting rape); Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2040 (1994) ("The overwhelming majority of jurisdictions will allow testimony based on [child abuse accommodation syndrome] when it is used to explain the significance of the child complainant's seemingly self-impeaching behavior, such as delayed reporting or recantation.").

¹⁴See, e.g., *Shahzade v. Gregory*, 923 F. Supp. 286 (D. Mass. 1996).

¹⁵See, e.g., *United States v. Denny-Shaffer*, 2 F.3d 999 (10th Cir. 1993).

¹⁶See, e.g., *United States v. Pollard*, 282 F.2d 450 (6th Cir. 1960).

¹⁷*People v. Yuki*, 83 Misc.2d 364, 372 N.Y.S.2d 313 (1975).

¹⁸The best-known example is the murder trial of Dan White in San Francisco, where the defense successfully argued diminished responsibility based on a hypoglycemic reaction to junk food. For an account, see GEORGE FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 28-33 (1995).

¹⁹See, e.g., *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975).

in which they made their appearance in court: premenstrual syndrome,²⁰ Vietnam vet syndrome,²¹ battered women syndrome,²² rape trauma syndrome,²³ child sexual abuse accommodation syndrome,²⁴ false memory syndrome,²⁵ and (one of the most recent entries) urban survival syndrome.²⁶

This list does not begin to exhaust the imagination of attorneys and their experts. Some of this psychological testimony is based on scientific research, or at least close observation of people with behavioral problems. Some of it amounts to purest fantasy. Most falls somewhere in between these two extremes. For now, it suffices to say that the courts have been confronted with a cacophony of psychological claims of varying respectability.

III. The Courts' Reaction

In handling this barrage of psychologizing, the courts have purported to follow the standard analysis used by all courts—criminal or civil—in evaluating the admissibility of expert testimony. That standard analysis comes in one of three variants.

The first is the test first advanced in *Frye v. United States*,²⁷ which looks at the extent to which the “thing” on which testimony is based is “generally accepted” among professionals in the relevant field. Courts that apply this test want to know whether a sizeable number of professionals who claim the same general expertise as the proffered expert endorse the expert’s theory and methodology. This inquiry is meant to give the court assurances that the expert’s testimony is not specious, but it does not directly assess its accuracy.

The second test, derived from well-worn common law but more recently memorialized in the Federal Rules of Evidence,²⁸ ignores degrees of professional acceptance and instead focuses on the relevance and “helpfulness” of the testimony. Championed by a number of prominent scholars,²⁹ this analysis in theory requires a more direct judicial assessment of validity (known in legal circles as *probative value*).³⁰ In practice, however, it leaves that issue up to the jury except

²⁰See note, *Premenstrual Syndrome: A Criminal Defense*, 59 NOTRE DAME L. REV. 253 (1983).

²¹See, e.g., *State v. Sharp*, 418 So.2d 1344 (La. 1982).

²²See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

²³See Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 691 ILL. L. REV. 710–726 (1989) (describing cases).

²⁴Askowitz & Graham, *supra* note 13, at 2040–44 (describing cases).

²⁵See, e.g., *State v. Carol M.D.*, 89 Wash. Appl. 77, 948 P.2d 837 (1997).

²⁶See, e.g., Wally Owens, *State v. Osby, The Urban Survival Defense*, 22 AM. J. CRIM. L. 809 (1995).

²⁷293 F. 1013 (1923).

²⁸Specifically, these courts look at Rule 702 (defining an *expert* as someone who has “scientific, technical or other specialized knowledge” that “will assist the trier of fact”); Rule 401 (defining *relevancy*); and Rule 403 (listing countervailing factors that might justify excluding relevant evidence).

²⁹See, e.g., MCCORMICK ON EVIDENCE § 203, at 874; Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence*, 115 F.R.D. 89, 89–91 (1987); 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 105 (1977).

³⁰Social scientists distinguish *validity* (accuracy) from *reliability* (replicability). The fact that a test or procedure can reliably measure something merely means that it yields the same result over time or with different observers; it does not necessarily mean that its results accurately (validly) identify a particular phenomenon.

on those rare occasions when probative value is clearly outweighed by other considerations such as the potential for jury confusion or undue prejudice to one of the parties.³¹

The third approach, made conspicuous by *Daubert*, also relies on the Federal Rules of Evidence but appears to be a more rigorous recasting of the relevancy approach. First, it puts more of a burden on the judge to screen expert testimony for its probative value and helpfulness.³² Second, it provides clearer instructions about how to screen opinions, principally by requiring that the judge look at whether the basis of the testimony can be and has been tested scientifically. Thus, *Daubert* urges the trial judge to look at "falsifiability," error rates, and the extent of peer review in referred journals, as well as general acceptance in the relevant field.³³ Although neither the *Frye* test nor the relevancy test preclude courts from engaging in this type of validity analysis, *Daubert* clearly emphasizes testability and accuracy concerns more than the other tests do. Perhaps the most concise statement of *Daubert*'s holding is the following language from the majority opinion: "[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."³⁴

Applying these tests to psychological testimony, one would expect that the *Frye* approach would be generous toward traditional psychological constructs (such as *DSM* diagnoses) and hostile to new unestablished ones (such as the urban survival syndrome), whereas the relevancy test would welcome virtually all but the most fatuous opinions. In contrast to both, a *Daubert* approach would favor only testimony based on behavioral theories subjected to serious scientific testing and found to be valid. However, the true story is more complicated, especially in connection with *Daubert*'s validity test.

As noted at the outset of this article, precious few psychological theories or constructs proffered in criminal cases meet the latter threshold. Leaving aside descriptions of research regarding eyewitnesses and a few other instances, what David Faigman and Amy Wright have said about battered women syndrome can be said about all psychological testimony: "researchers . . . have not come close to a serious scientific examination of their hypotheses."³⁵ Even testimony based on standard diagnoses are suspect. With "error rates" well above 50% for diagnoses such as antisocial personality and schizoid personality, and not much better for

³¹See generally Paul Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1239 (1980) ("In contrast to *Frye* . . . the relevancy approach does not attempt to assure the reliability of novel techniques prior to admission. . . . [T]o be sure under the relevancy approach some techniques will be excluded by the trial judge; but most will pass the threshold requirements of admissibility. . . .").

³²The Supreme Court made that requirement abundantly clear in *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997), decided 4 years after *Daubert*. See *id.* at 517 (holding that the Court of Appeals erred in applying an overly stringent standard of review to the trial court's ruling on the admissibility of scientific evidence and emphasizing the "gatekeeping" role of the trial court).

³³509 U.S. at 593-94.

³⁴*Id.* at 589. Here it appears Justice Blackmun was using the word *reliable* in the same way social scientists use the word *valid*. See *supra* note 30.

³⁵David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 106 (1997). See also Graham, *supra* note 2, at 162 ("[T]he testability or falsifiability and potential error rate factors for appraising [social science evidence, such as hypnotic refreshment, eyewitness identification, battered-woman syndrome, and child sexual abuse syndrome] will rarely be sufficiently present to meet the *Daubert* standard").

schizophrenia and organic disorder,³⁶ perhaps even testimony normally considered sacrosanct would be kept out under a literal reading of *Daubert*. Under this regime, as Stephen Morse has long advocated,³⁷ mental health professionals might at most be able to offer descriptions of behavior.

One would expect some recognition of these radical implications in the case law applying *Daubert*. There have been a few murmurings here and there.³⁸ On the whole, however, *Daubert* has had remarkably little impact on either the extent or the content of psychological testimony in criminal cases. One mammoth study that carefully reviewed every appellate decision dealing with the admissibility of battered women and rape trauma syndrome evidence since 1993 (the year *Daubert* was decided) through 1997 concluded that "[c]ourts are not generally engaging in scientific reviews of the proffered syndrome. . . . Most typically, the focus is on general acceptance and the qualifications of the expert, and even then the judicial review tends to be cursory."³⁹ Testimony based on standard diagnoses is even less likely to be challenged.⁴⁰

This is not to say that courts have never excluded psychological testimony. They have, under both *Frye* and *Daubert*, and even occasionally under the relevancy test. Whatever the applicable test, however, the reasons the courts reject such testimony seldom have much to do with its validity. As I have developed at greater length elsewhere,⁴¹ the variables that spell doom for expert psychological testimony are more apt to be (a) the extent to which the testimony is nomothetic (i.e., group or statistically based) as opposed to idiographic (i.e., focused on the

³⁶See Graham Mellsop et al., *The Reliability of Axis II of DSM-III*, 139 AM. J. PSYCHIAT. 1360 (1982) (reliability of personality disorder diagnoses in everyday clinical setting ranged from 49% for antisocial personality to 1% for schizoid personality); Paul Lieberman & Frances Baker, *The Reliability of Psychiatric Diagnosis in the Emergency Room*, 36 HOSP. & COMM. PSYCHIAT. 291 (1985) (41% agreement on schizophrenia, 50% agreement on mood disorders, 37% agreement on organic disorder).

³⁷Stephen Morse, *Crazy Behavior, Morals & Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 604-613 (1978).

³⁸Consider, for instance, this language from *State v. Cressey*, 628 A.3d 696, 701 (1993), in the course of a discussion about the implications of *Daubert*'s reliability requirement:

An expert using [the typical clinical multisource methodology] may candidly acknowledge any inconsistencies or potential shortcomings in the individual pieces of evidence she presents, but can easily dismiss the critique by saying that her evaluation relies on no one symptom or indicator and that her conclusions still hold true in light of all the other available factors and her expertise in the field. In such a case, the expert's conclusions are as impenetrable as they are unverifiable.

³⁹James T. Richardson, Shirley A. Dobbin, Sophia Gatowski, Gerald P. Ginsburg, Mara L. Merlino, Veronica Dahir & Cari Colton, *A Case Law Survey of Social and Behavioral Science Evidence After Daubert*, paper presented at the annual meeting of the American Psychology-Law Association (Div. 41, American Psychological Association), Redondo Beach, Ca. (March 1998) (on file with author).

⁴⁰To my knowledge, there are no reported cases excluding psychological testimony based on diagnoses such as the major psychoses and traditional personality disorders. I also base this statement on a query sent to Psy-law, a listserv with over 900 members, most of whom are forensic mental health professionals. I received only nine responses, but Charles Ewing's was representative: "In 99 percent of what we do we don't have to worry about *Frye*, *Daubert* or 702." Joe Dixon stated, "I have been involved with hundreds of criminal cases over the past ten years and testified in federal and state court dozens and dozens of times, and . . . I have rarely had my testimony challenged on [evidentiary grounds]."

⁴¹Slobogin, *supra* note 4, at 24-31.

individual in question); (b) the extent to which it departs from the medical model of mental disability (i.e., endogenous, organically based causes of illness) and instead endorses an exogenous etiology (i.e., external causes); (c) the extent to which it pushes the doctrinal envelope beyond well-accepted criminal law dogma; and (d) the extent to which, in the court's eyes, it merely provides information that is common knowledge and thus would trench on the jury's function. The more of these variables present, the less likely the testimony will be admitted, independent of its validity or general acceptance.

Thus, research-based testimony about the foibles of eyewitnessing, among the most valid psychological testimony, has often been excluded because its nomothetic nature does not directly address the accuracy of the eyewitness in question and because it is found to "usurp" the jury's role in credibility assessment.⁴² In contrast, Freudian hypotheses about a suspect's criminal behavior—perhaps the classic example of unfalsifiable testimony, yet idiographic and endogenous in character—are routinely admitted. Consider also the fate of testimony about the effects of rotten social background, television violence, and child abuse. Although such testimony fares poorly in the courts, its suspect reliability is seldom an expressed concern (after all, it is no more suspect than psychodynamic testimony). Rather, excluding courts allude to the exogenous orientation of the testimony, its nomothetic character, and/or the fact that it is often used to make doctrinally suspicious arguments.⁴³ As a final example, there are the differing fates of Vietnam veterans, rape and child abuse victims, and battered women: While all have relied on a version of posttraumatic stress syndrome (PTSD), only the ex-soldiers never experience problems with admissibility,⁴⁴ in large part because they are using PTSD to support an insanity defense, whereas the others are trying to bolster the credibility of a witness (assessment of which, remember, is the jury's province) or stretch traditional self-defense doctrine. In summary, scientific validity has yet to become the linchpin of admissibility analysis in criminal cases.

IV. Five Developmental Stages of Expert Evidence Law

The foregoing discussion suggests that judicial assessment of psychological testimony in criminal cases is heavily influenced by irrelevant or tangential factors.⁴⁵ It does not necessarily follow, however, that a scientific validity

⁴²See, e.g., *State v. Gardiner*, 636 A.2d 710, 713–14 (R.I. 1994); *United States v. Kime*, 99 F.2d 870, 884 (8th Cir. 1996). That courts prefer idiographic testimony is not surprising, given the case-specific nature of legal disputes. For other possible explanations or justifications for this seemingly antiscience stance, see Slobogin, *supra* note 4, at 22–23, as well as comments in this article, *infra* notes 56 & 88.

⁴³See *United States v. Alexander and Murdock*, 471 F.2d 923, 959 (D.C. Cir. 1973) (excluding testimony about rotten social background); *Zamora v. State*, 361 So.2d 776, 779 (Fl. 3d D.C.A. 1978) (excluding testimony about the effects of television violence); and *Jahnke v. State*, 682 P.2d 991 (Wyo. 1984) (excluding testimony about the "battered child syndrome").

⁴⁴Compare David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OREGON L. REV. 19, 66 (1987) (noting that Vietnam veterans have not encountered admissibility problems at the appellate level) with Fischer, *supra* note 23, at 706–26 (describing mixed judicial reaction to rape trauma syndrome); and Askowitz & Graham, *supra* note 13, at 2040–44; 2048–51; 2058–63 (describing mixed judicial reaction to child sexual abuse accommodation syndrome).

⁴⁵See generally McCord, *supra* note 44; Slobogin, *supra* note 4, at 19–29.

requirement must take front and center stage, as some have argued.⁴⁶ *Daubert's* emphasis on validity is long overdue, but it should not be seen as the culmination of sensitive admissibility analysis. Factors other than accuracy (and other than the variables that seem to influence the courts) should be considered.

One way of explicating this point is to think of the courts' approach to expert testimony in terms of five "developmental" stages, based loosely on the way individuals might obtain and process information about the world as young children, preteens, adolescents, young adults, and mature adults. Although the assertions about human learning that follow mimic Piagetian developmental psychology⁴⁷ and are linked in the next section to Kohlberg's theory of developmental morality,⁴⁸ they are more the product of my imagination and experience than anything else. They are meant merely as a heuristic for thinking about evidence law in developmental terms. These stages progress from primitive worship of the expert regardless of accuracy concerns, through independent assessment of the expert's testimony, to a stance that treats validity as a consideration secondary to other goals such as giving criminal defendants voice and ensuring the appearance of fairness.

A. *The Expert as Shaman*

The young child views the parent as the authority on everything. After all, this person is a certified Mom or Dad. To the child, the parent is the wisest and most knowing person in the world.

In some legal settings, mental health professionals appear to be treated no differently. For instance, judges and lawyers have been known to hand civil commitment proceedings over to psychiatrists.⁴⁹ Although few criminal courts are so supine (if only because the criminal trial process is at least nominally adversarial), many seem willing to allow testimony by any mental health professional with a high enough level of education and training.⁵⁰

Of the three formal evidentiary schemes described earlier, the one which fits best with this judicial attitude is the relevancy test. According to Paul Gianelli, as a practical matter this approach has meant that if the expert is qualified so is the basis of the expert's testimony.⁵¹ Under this regime, validity is not important. The key inquiry involves the expert's credentials.

Why might courts adopt such a lenient approach? The official explanation is

⁴⁶See David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989); Stephen Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 600-619 (1978).

⁴⁷See JOHN H. FLAVELL, *THE DEVELOPMENTAL PSYCHOLOGY OF JEAN PIAGET* (1963) for a comprehensive review of Piagetian terminology, theory, and research on the way children relate to space, language, and learning.

⁴⁸See *infra* note 68.

⁴⁹See, e.g., Serena Stier & Kurt Stoebe, *Involuntary Hospitalization of the Mentally Ill in Iowa: The Failure of the 1975 Legislation*, 64 IOWA L. REV. 1284, 1416 (1979) (reporting study of commitment hearings finding that "advocates function as clerks, and referees merely give pro forma approvals to form letters from hospital psychiatrists requesting extensions of patient's confinement periods.").

⁵⁰See Richardson et al., *supra* note 39 ("In most cases, the higher the status of the expert (e.g., an M.D. or Ph.D.) the more likely it was that the evidence would be admitted.").

⁵¹Paul Gianelli, *Daubert in the States*, 34 CRIM. L. BULL. 154, 155 (1998) (Under the "relevancy test . . . if the expert was qualified, the underlying technique used by that expert was also qualified.").

that jurors are assumed to have the ability to separate the wheat from the chaff, at least with the aid of the adversarial system.⁵² A second, not necessarily competing, explanation is that trial judges do not feel equipped to carry out the chore of gauging scientific validity; after all, the scientific method is a far cry from legal analysis. Although the second explanation is less logical (for if judges do not think they are competent to evaluate the expert evidence, they can hardly expect the jury to do a good job), it may be closer to the truth. As illustrated by the rules regarding the admission of hearsay and documents,⁵³ evidence law generally does not trust juries to evaluate the accuracy (as opposed to the credibility) of evidence. For some reason that distrust disappears when it comes to expert testimony. Perhaps the reason is that judges have much more trouble assessing the reliability of expert testimony than they do figuring out whether an out-of-court declaration is hearsay or a document is authentic.

In any event, the common denominator of both explanations is that the courts leave the validity assessment to someone else. Like the young child's attitude about most things, judges who adopt the relevancy approach feel that scientific inquiries are either beyond their ken or beyond their authority to make. In such cases, the expert is allowed to function almost like a shaman, a person who explains mysteries others cannot fathom. As long as the expert-shaman can show he is a conduit from the gods (i.e., credentialed), his words are treated with respect, if not reverence.

B. The Expert as Representative

As the young mature, they begin to question authority. Parents are no longer the only source of information. The preteen is more likely to check with other authority figures—teachers, books, and peers—before accepting something as gospel.

This urge for greater assurance parallels *Frye*'s general acceptance requirement. Not satisfied with one expert's sayso, *Frye* demands a showing that a sizeable number of other professionals in the field endorse the same sort of technique or theory that the proffered witness does. At the same time *Frye* does not, at least on its face, require any assessment of validity.⁵⁴ It mandates acceptance, not accuracy; group allegiance, not proof. The expert's testimony must simply be representative of common wisdom.

As is true in other contexts,⁵⁵ many courts evaluating the admissibility of psychological testimony reserve the more demanding *Frye* approach for "novel" theories and in all other situations use the relevancy test, take judicial notice of the technique, or ignore the expertise issue altogether. Thus, for instance, testimony based on standard *DSM* diagnoses is virtually always admitted if the expert is

⁵²This was the rationale of *Barefoot v. Estelle*, 463 U.S. 880 (1983), in which the Supreme Court upheld the admissibility of clinical predictions of dangerousness despite their low validity.

⁵³See Fed. R. Evid. 802 (prohibiting admission of hearsay) and 901 (prohibiting admission of unauthenticated documents).

⁵⁴*Frye* as applied may sometimes function as a validity test, but rarely so. See Note, *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1516 ("The *Frye* standard did not guarantee scientific validity, as demonstrated by the fact that certain forensic techniques admitted under *Frye* are no longer accepted by courts or scientists.").

⁵⁵See Gianelli, *supra* note 31, at 1202-03.

qualified, whereas syndrome evidence—relatively new as psychological testimony goes—is often subjected to *Frye* analysis.⁵⁶ To these courts, as to the pre-adolescent, it is new information that is suspicious. The possibility that old ways of looking at the world may be flawed is not even considered, because those ways come from the unremembered past.

C. The Expert as Scientist

Here the image is of the rebellious adolescent, who wants independent proof of everything. Authority figures, no matter how august or numerous, are to have their feet put to the fire. Unless they can show concrete evidence for their position, their opinions are worthless.

Daubert's call for validity assessments is in this vein. Qualifications are important, and general acceptance is nice, but unless the basis of the opinion has been tested scientifically and found to be reasonably valid, it is of questionable worth to the court system. This approach is a manifestation of an organism (human or judicial) that is no longer scared of venturing into mysterious territory and finding out for itself what is going on.

Thus, this approach is much harder to carry out. Whatever their worth on the merits, the first two stages of evidentiary analysis at least have the virtue of being relatively easy to apply. The *Daubert* test, on the other hand, requires significant mental muscle⁵⁷ (which may explain why, as noted above, courts have been reluctant to undertake the inquiry when it comes to psychological testimony). Adolescents take some hard knocks in their efforts to figure out the world, and so will those courts that apply *Daubert*. They will make mistakes and they will be fooled. It is all part of growing up.

D. The Expert as Enhancer

The adolescent moving into adulthood may become even more demanding of outside informants because, with a bit of experience under the belt, self-confidence in one's own viewpoint increases dramatically. To be considered useful, information from others must now not only be trustworthy but must also improve one's decision-making process. The views of parents, teachers, and others may be ignored if, in the young adult's estimation, they do not add to what is already known.

The idea that new information should have a positive effect on accuracy is a

⁵⁶See, e.g., *People v. Stoll*, 783 P.2d 698, 710 (Cal. 1989) (noting, in the course of holding that reliance on the MMPI and MCMI do not trigger *Frye* analysis, that *Frye* only applies to a "limited class of expert testimony which is based, in whole or in part, on a technique, process, or theory which is new to science and, even more so, the law."). Many courts do not even subject syndrome testimony to *Frye* analysis, however. See *supra* note 54, at 1493 ("Many *Frye* courts decline to follow *Frye* in considering evidence regarding various psychological syndromes, such as battered woman syndrome or rape trauma syndrome, and argue that *Frye* has traditionally been applied in cases that concern 'novel scientific devices or processes involving the evaluation of physical evidence.'").

⁵⁷As one commentator noted, "Now, a proponent of scientific evidence must provide not only articles citing studies and research showing acceptance of the scientific principle, but also must provide detailed descriptions of the studies themselves so that the trial judge can determine whether the studies' conclusions were derived by the scientific method." Jennifer Sparks, *Admissibility of Expert Psychological Evidence in the Federal Courts*, 27 ARIZ. ST. L.J. 1315, 1328 (1995).

preference for what, in scientific terms, is usually called *incremental validity*.⁵⁸ There is no clear evidentiary analogue to this point of view. Federal Rule of Evidence 702, on which both the relevancy and *Daubert* tests are based, does state that, to be expert, evidence must "assist" the fact finder. That language could be construed to require that expert evidence demonstrate incremental validity. Indeed, as noted earlier,⁵⁹ some courts have excluded psychological testimony on the ground that it does not add to what a jury could figure out for itself. However, these holdings are usually based on seat-of-the pants assessments as to what laypeople do and do not know and what experts can and cannot contribute, not on a rigorous scientific evaluation of whether validity would be enhanced by the testimony.

What would such an evaluation look like? Ideally, it would compare the accuracy of lay decision makers who have expert information to the accuracy of lay decision making without such information.⁶⁰ Such studies are surely feasible in connection with some types of legal determinations, such as whether eyewitnesses correctly report what they saw or whether an offender will reoffend. In most of the settings relevant to this article, however, this kind of research runs into a major obstacle: operationalizing the criterion variable. How does one assess the accuracy of a finding that, at the time of an offense, the perpetrator was "insane," did not "intend" to kill the victim, or felt (in the case of those asserting the influence of the battered woman syndrome) there were no alternatives to killing the batterer? Compared, for instance, to determining whether a person predicted to be dangerous subsequently offended, such constructs are very difficult, if not impossible, to measure. To the extent that is so, the goal of basing admissibility on a showing of incremental validity may not be a realistic one.

E. The Expert as Interpreter

This last point provides the predicate for the final developmental stage. The mature adult realizes that much is unknowable, at least not in this lifetime, and that concepts and values are malleable. The adolescent's and young adult's search for objective truth transmutes into a search for subjective truth, a way of making sense out of a convoluted world. Whereas such truth might come from the type of investigation scientists undertake, it is as likely to come from religion, commonly accepted wisdom, or novels and poetry. The mature adult realizes that just because something is not verifiable does not mean satisfactory answers can't be found.

Unfortunately, the criminal courts are frequently confronted with imponderable issues. Of particular relevance here, the doctrines of insanity, automatism, diminished capacity, diminished responsibility, and defensive excuse ask questions about past mental state that are, at present, impossible to answer with any

⁵⁸Mark Fondacaro et al., *Psycholegal Research in Non-Judicial Settings: Administrative Law*, a New Frontier, paper presented at the 1996 Biennial Conference of the American Psychology-Law Society, Hilton Head, South Carolina. As Fondacaro and his colleagues point out, valid information might not only not be helpful, it may actually detract from the accuracy of the decision-making process. For instance, expert testimony about the foibles of eyewitnessing may lead jurors to reject all such testimony.

⁵⁹See *supra* text accompanying notes 41–42.

⁶⁰Alternatively, research could merely determine whether lay decisions with and without experts vary. If not, the case against experts would be made. The following discussion assumes, however, that expert testimony would make a difference in cases in which past mental state is an issue. The question then becomes whether that difference is in the direction of greater accuracy.

degree of scientific precision. Furthermore, for both theoretical and practical reasons, "accurate" assessments of legally relevant mental conditions are unlikely ever to be available.⁶¹

Yet the law has opted for subjective assessments of blame-worthiness. Furthermore, it has done so for good normative reasons.⁶² Thus, these questions still deserve some type of answer. As Bonnie and I stated some time ago, "[i]f the law chooses to define culpability in subjective terms, it cannot close the door on the defendant's effort to reconstruct his actual state of mind."⁶³ That does not necessarily mean that the courts have to turn to mental health professionals in this endeavor. Perhaps lay judges and jurors can figure out the answers without any outside help. Because interpretation of ambiguous facts is what is needed, perhaps even novelists and poets, priests, and philosophers could be consulted. However, when there is no scientific way of gauging the accuracy of any particular opinion, the most sensible approach is to hear from those who have specialized knowledge about the issue in question, which in this case involves the effects of mental disorder.⁶⁴

The question remains whether, under this approach, any qualified mental health professional should be able to voice an in-court opinion on mental state issues. That is, should we revert to expert-as-shaman when criminal mental states are involved? *Daubert* does not necessarily prohibit such a stance. It avoided applying its validation requirement beyond "scientific" knowledge to the other two types of knowledge specified in Rule 702—"specialized and technical."⁶⁵ Although the Court's subsequent decision in *Kumho Tire Co. v. Carmichael* held that *Daubert* applies to all expert testimony, it also emphasized that "the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."⁶⁶

The relevancy test, as applied, is too flexible, however. It creates too great a risk that important decisions will be based on the whimsy of one convincing

⁶¹For explication of this point, see Slobogin, *supra* note 4, at 33–41. In a nutshell, the argument is that past mental state (a) is not objectively knowable even by the subject, much less by an expert or a jury, *id.* at 35–37; and that even it is, (b) "research relevant to past mental state . . . is so likely to be tainted by methodological flaws that in effect it is no different from interpretation and story-telling." *Id.* at 40. I also argue, however, that when the query is not about mental state, but about whether an act occurred (as is often the case when character or credibility evidence is proffered), a more scientific approach is warranted. *Id.*

⁶²This is not the place to go into these reasons. See generally LAFAYE & SCOTT, *supra* note 7, at 304–307 (describing justifications for the insanity defense); 240–41 (describing justifications for subjective mens rea requirements); and 457–58 (describing justifications for expanding self-defense doctrine).

⁶³Richard Bonnie and Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 446 (1981).

⁶⁴*Id.* at 452 (On the assumption that "the law will not become indifferent to a defendant's claim of abnormal psychological functioning at the time of the offense . . . it seems sensible to hear relevant opinions from those whose professional training and experience involve appraisal of the psychological dimensions of aberrant behavior.").

⁶⁵509 U.S. at 590 n. 8. Indeed, some courts have held that psychological testimony avoids *Daubert*'s strictures because it is not "scientific." Richardson et al., *supra* note 39 ("Evidence about battered woman syndrome was seldom classified as scientific evidence, and was more often classified as 'expert knowledge.'"). Some courts have taken an analogous approach in deciding whether to apply *Frye*. See *supra* note 56.

⁶⁶119 S. Ct. 1167, 1171 (1999).

charlatan. Just as the mature adult is leery of idiosyncratic fads that have no popular support, the courts should be reluctant to consider nonscientific testimony simply because it is material to a dispute. Some attempt to gauge the underlying theory's respectability ought to be made.

Some version of *Frye*'s general acceptance test is preferable because it is a more rigorous threshold, albeit one that does not necessitate proof of scientific validity. Under this test, as I would formulate it, the key admissibility question would be as follows: Is the expert's theory one that a sizeable group of professionals find plausible, based on their specialized knowledge? The test is described this way to avoid any connotation that the theory or concept must be accepted as "science"; the latter definition might make the test indistinguishable from *Daubert*'s. Thus, under the proposed version of *Frye*, any opinion based on a diagnosis found in the *DSM*, the professional's "Bible," would probably pass, regardless of its scientific credentials. Given its widespread currency, so would the theory that a battered woman who kills her batterer is more likely than most other killers to feel homicide is the only means of escape. In contrast, the theory underlying urban survival syndrome (which apparently posits that inner city youth are more likely than others to feel threatened by other inner city youth) would probably not meet the threshold. Scientific validity would not be required, but clinical plausibility would be.

V. More on the Fifth Stage: Voice and Appearance

The position that one might derive from the foregoing discussion can be summarized as follows: Expert psychological testimony should usually have to meet *Daubert*'s test; however, criminal courts should also admit psychological testimony that does not meet this test if (a) the testimony is attempting to explain a criminal defendant's mental state at the time of the offense; (b) it is based on theories or methodologies that are generally accepted by the relevant professional population; and (c) scientifically reliable evidence on the subject is not available.⁶⁷ As suggested earlier, the assumptions about human learning that were used as a foil for explicating this thesis do not even meet the relevancy test; I am hardly qualified to spout off a new Piagetan-type theory. To bolster the case for the fifth stage position, I now parlay a developmental theory with a much better pedigree than my own: Lawrence Kohlberg's study of the stages of moral development.⁶⁸

The important aspect of Kohlberg's research for present purposes is the distinction he makes between the preconventional and conventional levels of morality on the one hand and the highest, postconventional level on the other. Kohlberg concluded that, whereas the first two levels rely on obedience or deference to law, the last level relies on universal ethical principles.⁶⁹ Those

⁶⁷Here and in the rest of the article, I am assuming that the testimony is material, helpful, and not overly prejudicial. For a description of how these other three factors might be analyzed in connection with psychological testimony in criminal trials, see Slobogin, *supra* note 4, at 30–33; 42–54. See also Daniel Shuman & Bruce Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research*, 4 PSYCH., PUB. POL. & L. (1998) (arguing *Daubert* should apply only when scientific evidence exists).

⁶⁸See generally LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981).

⁶⁹*Id.* at 127–28 ("There is a universal set of moral principles held by people in various cultures. . . . At lower levels than Stage 5 or 6 [which together comprise Kohlberg's third,

principles include "universal principles of justice, principles of reciprocity and equality of human rights, and respect for the dignity of human beings as individuals."⁷⁰

The "law," as laid down in *Daubert*, is that scientific validity is king. However, there are at least two principles—one firmly embedded in our jurisprudence and one an important utilitarian consideration—that suggest that deference to that goal should not always be our top priority as a moral matter. The first principle is the litigant's fundamental interest in having his or her full story told to the fact finder. The second is the litigant's and society's interest in ensuring a process that appears fair and just. Both of these principles have special implications in the context of criminal adjudications, especially those focused on the culpability of the defendant's mental state at the time of the offense.

A. *The Right to Voice*

Ours is a society based on individualism and respect for diversity. Consistent with Kohlberg's postconventional formulation, we place supreme value on the dignity of human beings as individuals and on equality. Perhaps more than any other right, we treasure freedom of speech as a way of assuring that these principles are honored. Speech allows individuals to express their individuality and to promote their diverse points of view.

When the person who wishes to engage in such expression is a criminal defendant, special considerations arise. Not only are the First Amendment's protections triggered⁷¹ but the Sixth Amendment's guarantees of the right to confront accusers and the right to present evidence are implicated as well.⁷² Additionally, and most importantly in the present setting, the criminal defendant has a right to testify.

The 1987 U.S. Supreme Court decision that finally confirmed the constitutional basis of this right, *Rock v. Arkansas*,⁷³ is instructive. After holding that the right to present evidence, the Due Process Clause and the right to (decide whether to) remain silent all support a defendant's entitlement to take the stand,⁷⁴ the Court in *Rock* had to determine whether an Arkansas statute barring testimony by a defendant who had been subjected to hypnosis was a permissible restriction on the right. Conceding that memories induced through hypnosis can be fabricated, a five-member majority nonetheless found that a per se rule such as Arkansas' is unconstitutional. The statute did not permit the trial court to take into account the reasons for undergoing hypnosis, the circumstances under which it took place, or any independent verification of the information it produced.⁷⁵ Nor did it recognize that cross-examination, expert testimony, and cautionary instructions might

postconventional level] morality is not held in a fully principled form.").

⁷⁰LAWRENCE S. WRIGHTSMAN, *PSYCHOLOGY & THE LEGAL SYSTEM* 63–64 (1998) (summarizing Kohlberg's views).

⁷¹"Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

⁷²"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

⁷³483 U.S. 44 (1987).

⁷⁴*Id.* at 51–53.

⁷⁵*Id.* at 56.

counteract the inadequacies of posthypnotic testimony.⁷⁶ A case-by-case approach is mandated, Justice Blackmun reasoned for the Court, unless the state can show "that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial."⁷⁷

Rock's holding is a strong statement that defendants should be allowed to tell their story unless it is completely untrustworthy or so immune to the weapons of the adversarial process that its questionable nature is not likely to be exposed. Indeed, compared to the tests for expert psychological testimony examined in this article, it may even surpass the relevancy approach in laxness. However, *Rock* did not specifically deal with the admissibility of a defendant's story when it is told by an expert. Thus, when *Daubert* was decided 6 years later, one had to wonder how the two cases would be reconciled.

A partial answer to that question came in *United States v. Scheffer*,⁷⁸ decided just last term. The defendant in *Scheffer*, charged with taking methamphetamines, wanted to introduce the results of a polygraph test which indicated a "nondeceptive" response when he denied drug use. In another 5-4 decision,⁷⁹ the Supreme Court upheld the trial court's rejection of the polygraph evidence. Justice Thomas explained that "[t]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."⁸⁰ This language suggested that *Daubert* should trump *Rock* when a defendant wants to rely on suspect expert testimony.

Three other aspects of the opinion undercut that interpretation of *Scheffer*, however. First, as further justification for the ruling, Thomas made much of the assertion that polygraphs have an "aura of near infallibility."⁸¹ Jurors, said Thomas, may "give excessive weight to the opinions of the polygrapher, clothed as they are in scientific expertise."⁸² Whatever the truth of this conclusion with respect to polygraph evidence,⁸³ psychological testimony clearly does not possess the sirenic powers to which Thomas alludes. If anything, such testimony often has an aura of fallibility; at the least, it is more susceptible to common-sense assessment and dissection through cross-examination than the opinions of the polygrapher.⁸⁴

⁷⁶*Id.* at 61.

⁷⁷*Id.*

⁷⁸118 S. Ct. 1261 (1998).

⁷⁹Actually Thomas's sweeping language in *Scheffer* suggesting that per se exclusion was warranted did not attract even five members of the Court; Justice Kennedy, joined by three other justices, wrote a concurring opinion which agreed that the lower courts could reach the result affirmed in *Scheffer* but also stated: "I doubt . . . that the rule of per se exclusion is wise." Justice Stevens, the lone dissenter, argued that defendants should be permitted to at least tell the jury of the polygraph results.

⁸⁰*Id.* at 1265.

⁸¹*Id.* at 1267.

⁸²*Id.*

⁸³As Stevens noted, several studies have found that jurors are not "unduly swayed" by polygraph evidence. *Id.* at 1278 n. 26 (Stevens, J., dissenting).

⁸⁴See Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 1989 LAW & CONTEMP. PROBS. 133, 173 (reporting research indicating that jurors do not treat expert testimony on battered woman syndrome, rape trauma syndrome, and eyewitness reliability with an unwarranted aura of accuracy); Jane Goodman, *Jurors' Comprehension and*

In the same passage, Thomas stressed that the polygraph expert is focused on credibility alone. "Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth."⁸⁵ Echoing some of the lower court opinions discussed earlier,⁸⁶ he reminded that "[a] fundamental premise of our criminal system is that the *jury* is the lie detector."⁸⁷ Again, whatever one may think about psychological assessment of truth-telling, psychological testimony interpreting past mental state, in an effort to evaluate *culpability*, does not raise the threat to the jury's lie detection duties that seemed to concern the *Scheffer* Court.⁸⁸

More important still is the way *Scheffer* distinguished *Rock*. Thomas quoted from *Rock* the statement that an accused ought to be allowed "to present his own version of events in his own words."⁸⁹ Rejection of the polygraph results in *Scheffer* did not violate this precept, Thomas stated, because the trial court "heard all the relevant details of the charged offense from the perspective of the accused."⁹⁰ The defendant was not precluded from introducing "factual evidence" or "exercis[ing] his choice to convey his version of the facts";⁹¹ rather, he was barred "merely from introducing expert opinion testimony to bolster his own credibility."⁹² In contrast, expert testimony on past mental state presents facts, and inferences based on those facts, that not only support the defendant's story but may be the only source for it. Prohibiting such evidence would, in effect, prevent the defendant from giving "his own version of events in his own words."

Taken together, *Rock* (affirmatively) and *Scheffer* (by negative inference) reinforce the idea that psychological testimony, when presented on behalf of a criminal defendant seeking to mitigate culpability, deserves to be heard even if its validity cannot be proven scientifically.⁹³ Indeed, these cases suggest that even general acceptance may not be required. Although I would disagree with the latter outcome, I agree with *Rock*'s insinuation that a relaxed standard for criminal

Assessment of Probabilistic Evidence, AMER. J. TRIAL ADV. 361, 386 (1992) ("These studies indicate that attorneys have little need to be concerned that jurors will overbelieve or overuse experts who present probabilistic evidence.").

⁸⁵118 S. Ct. at 1267.

⁸⁶See *supra* note 42.

⁸⁷*Id.* at 1266.

⁸⁸At a deeper level, the Court's concern might be with any move toward allowing criminal trials to be decided by technological as opposed to human means. Cf. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). If so, then the Court might also have problems with any "scientific" psychological testimony that directly addressed the issue of guilt, such as credibility assessments of defendants or victims.

⁸⁹*Id.* at 1268 (quoting *Rock*, 483 U.S. at 52).

⁹⁰*Id.* at 1268.

⁹¹*Id.* at 1268-69.

⁹²*Id.*

⁹³Another Supreme Court decision that should be mentioned in this regard is *Barefoot v. Estelle*, 463 U.S. 880 (1983), which held that psychiatric predictions of dangerousness are admissible in capital sentencing proceedings even assuming they are wrong two out of three times. One would hope that a Court that would permit such shaky evidence to be presented by the prosecution would not deny a defendant the support of a psychiatric expert on *Daubert*-type grounds, although anything is possible. Cf. Christopher Slobogin, *Having It Both Ways: Proof that the U.S. Supreme Court is "Unfairly" Prosecution-Oriented*, 48 FLA. L. REV. 743 (1996).

defendants, short of *Daubert's* validity test, is justified. Concluding otherwise would deprive the defendant of the voice the Constitution guarantees.

B. The Importance of Appearance

A second reason for applying flexible evidentiary standards to psychological testimony proffered by criminal defendants is a utilitarian version of the first reason: the goal of promoting a system which not only is fair but also *appears* fair. This latter goal is important because societal respect for the criminal justice system helps ensure cooperation with the authorities and encourages obedience to the criminal law generally. As Tyler has demonstrated, people obey the law not just out of fear of punishment but because they want to be law-abiding citizens.⁹⁴ From this premise, Robinson and Darley have argued that a substantial gap between community sentiment and the criminal law may reduce the latter's "moral credibility," and thus people's willingness to comply with it.⁹⁵ In short, to the extent the criminal justice system ignores the moral consensus of the laity it reduces its power to command law-abiding behavior.

On this view, preventing criminal defendants from telling the best story they can—which might be the impact of a ban on nonscientific psychological testimony—would detract from the system's legitimacy and its ability to extract compliance with the law. I do not find this argument as persuasive as the previous argument about voice.⁹⁶ However, I think it is at least worth considering whether maintaining system legitimacy among the citizenry is also—like the constitutional argument about voice—a higher principle that might trump concerns about evidentiary validity.

The delegitimizing effects of exclusion are most easily imagined among those who are litigants in the system. The procedural justice literature has clearly established that a procedure that gives participants a full opportunity to present their version of the facts enhances perceptions of fairness, satisfaction with outcomes, and respect for the process.⁹⁷ Conversely, a procedure that does not do so is more likely to create antipathy toward the system among those it has frustrated, with the concomitant repercussions that Robinson and Darley hypothesize.

More speculative is the suggestion that denying criminal defendants the ability to tell their stories through experts would similarly affect the perceptions and

⁹⁴TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 63 (1990) ("Respondents are almost equally likely to comply with the law because they view it as legitimate whether they think the likelihood of their being caught is high or low, whether or not they think their peers would disapprove of law breaking, and whether or not they think law breaking is morally wrong.").

⁹⁵PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 7 (1995) ("The legal system that the community perceives as unjustly criminalizing certain conduct is one that is likely to cause the society governed by those laws to lose faith in the system—not only in the specific laws that lead to the unjust result, but in the entire code and criminal justice system enforcing that code.").

⁹⁶See Christopher Slobogin, *Is Justice Just Us? Using Social Science To Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOL. 315, 326–327 (1996) (arguing against shaping substantive criminal law based on concerns about public disapproval).

⁹⁷E. Allan Lind & Tom R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 70 (1988) ("[t]here is a growing body of research showing that the experience of procedural justice not only enhances evaluations of persons, institutions, and specific outcomes, but also leads to greater overall satisfaction with the legal experience and more positive affect with respect to an encounter with the justice system.").

behavior of the public at large. Many members of the public undoubtedly think that psychological testimony is mumbo-jumbo, and most of them are probably also hostile to the legal doctrines that give rise to it.⁹⁸ To such people, an individual who has done the crime should do the time, regardless of any exculpatory mental state; indeed, for them a prohibition on psychological testimony might lead to more faith in the fairness of the system, not less.

Consider as a counterexample, however, testimony about battered woman syndrome. Twenty years ago, most courts refused to hear such evidence because it suggested that women were justified in killing their batterers even when they were not in imminent danger at the time of the killing.⁹⁹ Clearly, the latter stance was a significant modification of traditional self-defense doctrine. Feminists and others, however, made persuasive arguments that the battered woman's reality was different than the ordinary person's.¹⁰⁰ Just as importantly, the crusade against intrafamilial abuse became a cause celebre.¹⁰¹ Today not only do most courts admit testimony about battered woman syndrome, over 10 states require its admission by statute.¹⁰² Governors have commuted the sentences of battered women convicted for murder, and states have created clemency boards with the mission of making amends to such women.¹⁰³

If the criminal justice system were suddenly to put a stop to testimony about the battered woman syndrome on the ground that its basis has not been sufficiently tested scientifically, an uproar would surely follow. The perception, if not the reality, would be that battered women were being denied a vital means of telling their stories. To avoid such damage to the political viability of the system, one might conscientiously endorse continued admission of this syndrome testimony, despite its suspect nature; I for one would, on the twin assumptions that the basis of the syndrome is still accepted by a sizeable group of mental health professionals and that the result of such testimony would usually not be outright acquittal.¹⁰⁴

⁹⁸Based on a scanning of news media reports, Perlin concluded that "[s]ociety is simply overwhelmingly skeptical about the use of the insanity defense in virtually any case." Michael Perlin, "The Borderline Which Separated You from Me": *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1403-04 (1997).

⁹⁹Moenssens et al., *supra* note 2, at 1135 ("In the early battered spouse cases . . . [w]omen were foreclosed altogether from using a self defense claim because the killing was not committed during an abusive attack.").

¹⁰⁰As one example, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 92-93 (1991) (comparing the battered woman to a hostage and stating, "We believe danger to a hostage is imminent both because the force used to hold them there is apparent and because our cultural knowledge includes the memory of the many hostages who have been harmed in the past.").

¹⁰¹As one source asserted, women are more likely to be battered than to be raped, mugged, or involved in a car accident. Fact Sheet, Maryland Battered Spouse Syndrome Bill (H.B. 49, S.B. 141, 1991 Sess.).

¹⁰²Robert Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 484 & n.77 (1996) (noting that the syndrome is "typically admitted either as a result of court rulings or . . . as a consequence of a specific statutory authorization mandating admissibility of BWS evidence," and listing 11 such statutes).

¹⁰³See Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 719-742 (1994) (describing commutations and review panels in several states).

¹⁰⁴In my view, a manslaughter conviction, based on an imperfect self-defense theory, is not only the best normative result in most such cases, but also the result that is least likely to cause damage to

Such a stance might also be justifiable in cases involving “soft” opinion testimony about the past mental state of those with mental retardation, serious mental illness, and at least some of the “syndromes” that have come along in the past several decades.¹⁰⁵ A criminal justice system that routinely prevented criminal defendants from offering plausible stories based on theories that are accepted by the relevant professionals could well fall into disrepute. If so, once again an obsession with scientific validity would ill-serve the ultimate goals of the system.

VI. Conclusion

Daubert interpreted Federal Rule of Evidence 702’s language mandating that expert opinion “assist” the trier of fact to require proof of scientific validity. Assistance can come in many guises, however. Under one definition of helpfulness, for instance, *Daubert*’s expert-as-scientist rubric is not rigorous enough; only the expert as enhancer—that is, an expert who demonstrably improves the accuracy of the legal determination—would meet the assistance-to-the-fact-finder test. At the other end of the spectrum, the expert as shaman can help the legal fact finder deal with the mysteries of the unknown, and the expert as representative can provide commonly accepted clinical wisdom unavailable to the courts. When scientific evidence is not forthcoming, experts functioning in the latter two roles might also be said to be acting as interpreters who help give the defendant the voice that the Constitution and a criminal justice system seeking popular support demand. Choosing the level of help an expert must provide before his or her testimony is admitted as evidence depends on a number of variables, including the extant scientific data, the substantive issue involved, the extent to which the jury can sift through the expert’s information, and the degree of potential error we are willing to tolerate in light of constitutional and systemic demands.

I take the view that a fixation on scientific validity is short-sighted. If offered by a criminal defendant on the issue of mental state at the time of the offense and generally accepted among the relevant professionals, psychological testimony should be admissible even when (as typically is the case) it does not meet *Daubert*’s test. A mature evidentiary system can do no less.

Received June 11, 1998

Revision received November 9, 1998

Accepted March 29, 1999 ■

the system’s credibility, because of its balance between appearing too “soft” and too “harsh.” This latter point suggests that, from the utilitarian perspective being discussed here, the same distinction between past mental state and other types of clinical cases made earlier, see *supra* notes 61 & 88, might be useful here as well. In contrast to a character evidence defense or the typical credibility testimony offered by a defendant, a mental state defense rarely results in outright release if successful. Instead it either lands the defendant in a mental hospital, as in insanity cases, or in prison with a reduced sentence, as in diminished capacity and battered spouse cases. Limiting the flexible standard to the latter type of cases might soften the anti-expert stance on the part of those who take that view primarily out of concern for public safety.

¹⁰⁵Including, perhaps, rape trauma syndrome. Although this evidence is presented by the prosecution, it is about past mental state (the alleged rape victim’s) and helps tell the woman’s story. At least when offered in rebuttal of a specific defense allegation (e.g., that the woman could not have been raped because she did not report the incident for a week), it should probably be admissible.